Virginia Law Register

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A BLOW AT TECHNICALITIES.

So far as litigants in the State Courts of this Commonwealth are concerned the following act, including its title, is the most important which was passed at the recent session of the General Assembly, viz:

AN ACT

To prevent the hearing of causes in the supreme court of appeals of Virginia on imperfect records and their decision on technical points without regard to the merits; and to simplify procedure in that court, in regard to bills of exceptions.

Patron—Mr. Brock.

Referred to Committee on Courts of Justice.

1. Be it enacted by the General Assembly of Virginia, That no case shall be heard or decided in the court of appeals on an imperfect or incompetent record, but when said court shall be of opinion that any record or part thereof, testimony or proceeding has not been properly identified or certified so as to make it a part of the record in the case, and to bring it properly before the appellate court and that justice may be done by directing the trial court to cure the defects in the record, it shall so order; and when the defects shall have been so cured it shall proceed with the hearing on the merits.

The second section of the original bill was in the following words:

"2. No case, civil or criminal, shall be reversed by the court of appeals for any error unless said court shall be of opinion that such error goes to the merits of the case, and that justice cannot be done according to the very right of the case; and the object of this act being to simplify procedure and hasten the administration of justice, it shall be liberally construed."

But it was stricken out, and only the first section went through. By concerted effort of those interested, it is more than probable that it will pass at the next session.

It was first introduced in the following form by Senator W. D. Blanks of Mecklenburg County, to-wit:

SENATE BILL NO. 55.

A BILL.

To prevent the hearing of causes in the Supreme Court of Appeals of Virginia on imperfect records and their decision on technical points without regard to the merits; and to simplify procedure in that court.

Patron—Mr. Blanks.

Referred to Committee on Courts of Justice.

1. Be it enacted by the General Assembly of Virginia, That whenever, on the hearing of any cause in the Supreme Court of Appeals of Virginia, said court shall be of the opinion that exceptions have not been properly taken in the trial court so that a decision may be had on the merits, or shall be of the opinion that any record, or part thereof, testimony or proceeding has not been so certified as to make it a part of the record in the cause being heard so as to bring it properly before the appellate court, it shall order a new trial by the trial court, unless, in its opinion, justice may be done by directing the trial court to cure the defects in the record, in which event it may so order; and, when the defects have been so cured, proceed with the hearing on the merits; or if, in its opinion, justice can be done by affidavits taken in the Supreme Court of Appeals, it may receive such affidavits and proceed with the hearing. The object of this act being to simplify procedure and hasten the administration of justice, it shall be liberally construed.

If construed liberally this bill will effect a most far reaching reform in the administration of justice. In reforms relating to procedure, Virginia once took the lead in the Eighteenth Century, and it held it until the impending crisis of the Civil War arrested progress about the middle of the Nineteenth Century. By the Code of 1849 the Legislature conferred power upon the Supreme Court of Appeals to initiate needed changes in procedure.[1] Doubtless the fact that the public mind was absorbed by the great question of secession prevented the court from exercising its powers. But whatever may have been the reason,

1. Code of Va. (1904), § 3112; Code of 1849, ch. 161, § 4, p. 625.

nothing was then done, nor has anything since been attempted under that beneficent statute. At a very much earlier period in its history the courts of last resort in Virginia frowned upon technicalities. However, the first case arising on a motion which went to the Supreme Court of Appeals reached that court in 1791 from the County Court of Bedford.[2] The court reversed and sent it back assigning, among other reasons, "this (the remedy by motion) being a new law, introducing a new remedy contrary to the course of the common law, ought to be strictly pursued." (P. 74.)

The first form of motion was against public officers for failure to discharge their duties by paying over money and the like. In 1849 the remedy was greatly enlarged and the revisors in their report give the following reasons for the changes recommended by them, to-wit:

"We deem this a very important section. To simplify and shorten pleadings and other proceedings, is an object which has been greatly desired of late years by legislators, both in *England* and this country. But in neither country have any pleadings or proceedings been introduced simpler or shorter than the proceeding in *Virginia* on motion. By this mode of proceeding, all claims of the commonwealth and a large number of those of individuals are now recoverable; yet a formal point scarcely ever arises upon a motion; the case is very generally decided upon its merits. A brief notice serves the double purpose of a writ and a declaration; and though a defendant is not precluded from pleading, yet as the case can be heard without pleading, pleadings are in fact very rarely filed. Seeing that this mode of proceeding has worked well in the cases in which it has been heretofore allowed, it seems to us advisable to extend it to all cases in which a person is now entitled to recover money by action on a contract. We do not propose to take away the right of bringing an action from any person; we propose merely, when his claim to money is on a contract, to allow him to use, if he please, the more simple remedy by motion, instead of an action. The permission to proceed in this way, will, we believe, cause motions gradually to take the place of actions for all such claims."

2. Asberry, etc. *v.* Calloway, etc., 1 Va. (1 Wash.), 72.

The last General Assembly amended § 3211 so that damages on a contract may now be recovered by motion; and the right to sue by motion for a statutory penalty is also added to the section. We, therefore, have now a remedy for all torts and contracts by motion as well as by declaration at common law.

The principle of the motion is scientific, and recognizes that as a matter of justice the litigants are entitled to a trial on the facts *proved,* without regard to the *form* in which they are expressed. This is the principle which England adopted in 1873 at the time it abolished all common-law actions and forms. A code of procedure is nearly as objectionable as the old common-law forms, because it is too rigid.

The recent acts invite the courts to administer the law without regard to the form of the complaint, and according to the rights of the parties. We may all hope that the day is not far distant when we may boast, as Englishmen now do, that we can get all the relief to which we are entitled both legal and equitable without regard to the form of the action or the forum in which the claim is asserted. W. Blake Odgers, writing on the Common Law in 1911, says: "But now, in most, if not all of our Civil Courts, superior or inferior, every kind of relief legal or equitable can be claimed and given; and even where it is not claimed, yet if the right to it appear incidentally, in the course of the proceedings, the appropriate relief will be granted.[3]

If any party is dissatisfied with the result in the lower court, he can appeal. The appeal is very much like the hearing of a motion for a new trial with us. But when the appeal is heard the court "can amend the pleadings, enlarge time, receive fresh evidence, draw inferences of fact, direct issues to be tried, or accounts and inquiries to be taken or made, and generally it has power to give any judgment and make any order which ought to have been made" by the trial court.

The Virginia statute relating to technicalities in the Supreme Court of Appeals was intended to confer power upon the court to get rid of technicalities as far as possible. The action of the Legislature is along the line of real improvement. All of our

3. 2 Odgers on the "Common Law of England," 1137 (London 1911); 4 Id. 1323.

procedure, especially at common law, has been too rigid. The attempt to make it flexible is undoubtedly in the right direction. The defect in the title to such an act should undoubtedly be liberally construed, and doubtless will be by the Supreme Court. There can be no doubt that any litigant is entitled to a decision by the court on the facts proved and not on the form in which he has stated them. In the city of Richmond, the Civil Justice's Court has jurisdiction up to $300; there are no pleadings except the warrant, and the bill of particulars, if called for, and it disposes of about 16,000 cases a year. The justice sits without a jury and tries the cases according to the principles of law and equity and there are very few appeals. Nothing will modernize our courts and popularize them so much as doing away with technicalities. The active interest taken by the REGISTER in the reform of the procedure has been of immense service. A modern lawyer should be so situated as to be able to devote his time to the facts and the law and not to the form in which he may be forced to ask for relief.

The Virginia method of procedure by motion appears to be even better because simpler than the elaborate system of Lord Chancellor Selborne by which law and equity procedure was fused by the Judicature Acts of 1873.

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